92-1827

Supreme Court, U.S.
FILED
MAY 12 1993
OFFICE OF THE CLERK

No.

in the
Supreme Court
of the
United States

OCTOBER TERM OF 1992

FRANK BONA, SR.

Petitioner,

vs.

MANUEL CHAVEZ, SR and
GERALDINE VIGIL CHAVEZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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47 pp

QUESTIONS PRESENTED

1. Whether the Court violated the prohibition of the impairment of the obligation of contracts provision of the Constitution of the United States when it chose to ignore or to impose its own interpretation of the provisions in a contract executed by experienced and competent adults which provides that "Time is of the essence of this Contract" for the times of delivery of the consideration for the Contract and for the time to close?

2. Whether an order directed to the Petitioner, who was representing himself at the time on a motion that he would not be heard and was threatened by the Court that liaison would be called and have Petitioner thrown out if he spoke, was a violation of the due process clauses of the Constitution of the United States?

3. Whether the failure to vacate an order of summary judgement awarded to respondents and the dismissal of all counterclaims of the petitioner ordered by the sitting Judge which order was entered prior to a motion of recusal of said Judge made by the petitioner and which order of recusal was signed and entered by the recused Judge who thereupon refused to hear motions or argument of petitioner to vacate said judgement and dismissal of all counterclaims, a denial of the due process clauses of the Constitution of the United States?

LIST OF INTERESTED PERSONS

FRANK BONA, SR., Petitioner
MANUEL CHAVEZ, SR., Respondant
GERALDINE VIGIL CHAVEZ, Respondant

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vs.

MANUEL CHAVEZ, SR and
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Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the Decision of the Supreme Court of Florida entered on February 15, 1993 wherein the Petition for review was dismissed and that no motion for rehearing will be entertained by the court.

OPINIONS BELOW

1. A copy of the Order of the Supreme Court of Florida dated February 15, 1993 that it is without Jurisdiction, that the petition for review is thereby dismissed, and that no Motion for Rehearing will be entertained by the Court appears in the appendix at page App. 3.

2. A copy of the Order Of The District of Appeal of Florida, Third District filed January 19, 1993 denying Appellant's Motion for Rehearing appears in the appendix at page App. 4.

3. A copy of the Order of the District Court of Appeal of Florida Third District filed November 24, 1992 affirming the opinion of the Circuit Court for Dade County appears in the appendix at page App. 5.

4. A copy of the Order Denying Appellant's Emergency Motion For Stay Of Execution dated July 30, 1992 appears in the appendix at page App. 6.

5. A copy of the order of Recusal dated July 20, 1992 of the Judge of the Circuit Court of the 11th Judicial District in and for Dade County, Florida appears in the appendix at page App. 8.

6. A copy of the Order Granting Motion To Tax Costs and Attorney's Fees of the Circuit Court of the 11th Judicial District in for Dade County, Florida dated June 12, 1992 in the appendix at page App. 9.

7. A copy of the Order on Motion For Summary Judgement and Final Summary Judgement for Specific Performance of the Circuit Court of the 11th Judicial Circuit, in and for Dade County, dated April 13, 1992 Florida appears in the appendix at page App. 11.

JURISDICTION

The decision of the Supreme Court of Florida was entered on February 15, 1993 which dismissed the Petition for Review with the caveat that no motion for rehearing will be entertained by the court. This Petition for Certiorari was filed within 90 days from that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED:

The Contract clause of the United States Constitution Article I, Section 10, Clause 1 provides;

Section 10 — States prohibited from the exercise of certain powers.

1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

U.S. Const. Amend. XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Frank Bona "petitioner" (owner) and Manuel Chavez, Sr. and Geraldine Vigil Chavez "respondents" (prospective purchasers) entered into an agreement entitled Agreement For Assignment which was signed on or about August 8, 1990. This agreement was terminated by the parties, because respondents were unable to purchase i.e. close for the transfer of title in their name pursuant to the terms of the agreement which provided for closing on or before August 31, 1990, in which agreement time was made of the essence because respondents did not have sufficient funds, or a mortgage loan, to purchase the subject Real Estate. A second agreement entitled Contract For Sale and Purchase was thereafter agreed upon by the parties and was signed on October 30, 1990 which contract provided that respondents were to purchase and close the subject single family residential property on or before December 31, 1990, also in which agreement time was made of the essence.

The said Contract for Sale and Purchase of the parties made, time of the essence of payments of part of the consideration recited therein, namely delivery of two promissory notes signed by petitioner, as obligor, marked canceled and paid in full, to petitioner on or before November 2, 1990. Delivery of said notes was also a condition precedent of the said contract which also made not only time of the essence of payment of the initial consideration and any other payments or fulfillments of any other obligation, as may become due on the contract, but also made time to close of the essence of the agreement. Respondents did not deliver or perform with sufficient funds in the first agreement which agreement was canceled by the parties and therefore did not close with respondents on or before August 30, 1990, but also

respondents failed to deliver the aforementioned promissory notes held by respondents, upon which notes petitioner was the obligor, in the second agreement, i.e. Contract for Sale and Purchase or come up with sufficient funds and/or credits which would be applied toward payment such as by qualifying for and agreeing to assume and become obligated on the existing mortgage and close on the second agreement.

The central issue in these proceedings were the meaning and application of those clauses in the contract which relate to the time of the essence of delivery of the promissory notes, the first major consideration of the contract and a part of the total consideration which were not delivered timely, and have not been delivered to petitioner to date and the time of essence for closing namely on or before 12-31-90 which closing respondents would not or could not perform timely.

Respondents eventually sued petitioner for specific performance. The court entertained only motions of the parties, and there were depositions of the parties and of a document examiner, an employee of Columbia Title in Dade County, but never a court trial per se. Respondents made a motion for summary judgement and the same was granted by the Judge of the 11th Judicial District in and for Dade County, Florida, who dismissed petitioner's motion for Summary Judgement together with all counterclaims which included payments made by petitioner which were essentially rental payments due and owing by respondents to petitioner; services rendered by petitioner at the request of and pursuant to promises made by respondents to pay for same; and expenses incurred for and on behalf of respondents together with other remaining claims all of which including the foregoing for a total of nine counterclaims.

The Court also granted respondents all attorney's Fees and Costs. Petitioner appealed all rulings of the court which granted Summary Judgement, together with attorney's fees and costs to respondents and which denied petitioner's Motion for Summary Judgement and dismissed all of petitioners' nine Counterclaims, to the District Court of Appeal of Florida, Third District. The said District Court of Appeal affirmed the decision of the lower court. The appeal which followed to the Supreme Court of Florida affirmed the decisions of the two lower courts. Each of the three decisions were tantamount to one word edicts, the likes of such as granted, affirmed, denied, all without opinion.

The terms of the written agreements of the parties are clear and unambiguous.

The lower court failed to observe the clear and agreed terms of the contracts negotiated at length and executed by experienced parties. What the court did was to rewrite the parties' contract. This is something that case after case points out emphatically is not its province. The effect of the same is that the Lower Courts' ruling constituted an impairment of the obligation of contracts in violation of Article I Section 10 paragraph 1 of the Constitution of the United States. The lower Court also violated the due process clause of the United States Constitution, Amendment XIV.

The court should not have looked beyond the language of the contract in this case. The parol evidence rule provides that when contracting parties write down in clear English what they mean, they are held to have meant what they said. *Hurt v. Leatherby Ins. Co.*, 380 So.2d 432; *Jaar v. University of Miami*, 474 So.2d 239. The rule promotes certainty in business transactions and has a

valuable place in modern law for that very reason. It is a rule the lower court ignored, and in doing so it impaired the obligations of the Contract of the parties and thus violated the Constitution of the United States.

On or about June 26, 1990, petitioner entered into a Contract of Sale for the property which is the subject of the instant litigation, with a third party, the estate of Alice Bell Bettman (The "Estate").

The Contract between petitioner and the Estate called for a closing date of July 31, 1990, which was subsequently extended to August 31, 1990 only after petitioner had paid an additional $5,000.00 to the Estate for a one month extension to close.

Said Agreement for Assignment (the Assignment) was given for consideration, payable in two installments, and conveyed to respondents only those rights that petitioner had under the contract with the Estate. The assignment clearly referenced the above-mentioned closing date of August 31, 1990.

Shortly prior to the scheduled closing date of August 31, 1990, it became apparent to petitioner and respondents that respondents did not have the financing, the cash or the equivalent to complete the purchase in their own name as required by the original sales contract. These facts were acknowledged and accepted by respondents.

In an attempt to minimize damages which could result in costly litigation if the sale was not closed timely with the seller, petitioner and respondents rescinded the Agreement for Assignment and the closing was completed in petitioner's name, utilizing financing previously arranged and secured only by petitioner, and for which

petitioner was the sole guarantor in the sum of approximately $375,750.00.

Additional funds in the amount of $172,964.84 were borrowed by petitioner from respondents in order to close timely with the estate and said loan was evidenced as a loan by two promissory notes signed by petitioner, delivered to and held by respondents which had been in the possession of respondents i.e. until November 1991, over more than one year later than the date respondents contracted to deliver them to the petitioner namely on November 2, 1990, which later date of delivery was made of the essence in the contract, but instead proffered them to the Court about one year later than they were required to deliver them to petitioner.

Once title to the subject property was vested in petitioner, petitioner attempted to convey the property to respondents pursuant to a new agreement which was reached after almost two more months of negotiations.

Accordingly, a Contract of Sale and purchase was executed between petitioner and respondents, on October 30, 1990 with a supplemental memorandum to the Contract, also dated and executed simultaneously therewith entitled "Agreement between Geraldine Vigil Chavez and Manuel Chavez, Sr."

The contract and contemporaneous agreement between petitioner and respondents also called for a sale not conditioned or contingent upon respondents' ability to obtain financing for the purchase price or to qualify for any assumption of the existing mortgage. The Contract and agreement stated that the closing was to occur on or before December 31, 1990 and respondents on each and every occasion from the date of the contract i.e. October

30, 1990 to December 31, 1990 failed to deliver sufficient funds or documentation to close. Respondents did not have the funds to close or could not qualify timely to be approved to assume the mortgage.

To date, respondents have not delivered to the petitioner the said promissory notes, almost more than 2 years and 6 months later, to the date of this appeal.

Respondent from the commencement of the contract and throughout these proceedings has had less than a 1/3 of the money to close whereas petitioner had the total sum in cash and credits to close or in excess $547,000. This contention is buttressed by the fact that two promissory notes in the sum of $172,964.84 were signed and delivered by petitioner, as obligor, and accepted by respondents, as payees. This clearly is evidence of a loan transaction. No other agreement was made or intended. No other document, commitment or writing was made or given except for the said promissory notes. The said promissory notes have remained in respondents' possession for more than one year beyond the date which respondents agreed and contracted to deliver to petitioner marked canceled and paid in full as the down payment and as part of the consideration for the Contract of Sale and Purchase executed on October 30, 1990 by the parties. The promissory notes were simply and are actually only promissory notes a promise to pay a loan, because at the time of the making, the signing and delivery of the notes by petitioner to respondents there was no contract in existence and none was intended or agreed upon and likewise for an extended period of time thereafter, i.e until October 30, 1990, when a second agreement was agreed upon, prepared and executed.

Furthermore as respondents have failed to satisfy the condition precedent of the October 30, 1990 Contract for Sale and Purchase and the attached Agreement, executed together, which called for the delivery of said notes, marked canceled and paid in full, and whereas the initial and part of the consideration for the Contract for Sale and Purchase and the attached agreement was not delivered to petitioner on or before November 2, 1990, wherein time was made of the essence of the contract, the contract failed. Simply stated that as of that time, as there was no initial consideration for the contract, there was no contract. The law is clear that ordinarily a purchaser in default cannot recover a deposit. In the at bar as the contract was breached, the promissory notes were voided and became satisfied and transferred into nullities by reason of respondents' breach.

As there are genuine, material issues of fact which are in dispute in so far as any case for respondents is concerned and since respondents have failed to refute petitioner's Affirmative Defenses of failure to satisfy conditions precedent and of respondents' inability to perform and therefore have defaulted because of their inability or refusal to close timely, the respondents' motion for summary judgement should have been denied and the order of the judge of the lower court who later recused himself from the case must be reversed.

As the return of these notes marked paid and canceled were the consideration for the execution of the contract and the time of delivery of the said notes and the date of the closing were made of the essence of the "Agreement" and the "Contract" of Sale and Purchase," and were also conditions precedent to the continuation or the survival of the agreement, summary judgement should have been granted to petitioner.

The dates of letters by which demands by petitioner upon respondents for return of said notes and related matters, are dated as follows:

1) December 4, 1990
2) December 13, 1990
3) December 28, 1990
4) December 31, 1990

Respondents did not acquire a mortgage loan or qualify to assume the existing mortgage or pay cash for a period of more than 2 years after the time scheduled for closing pursuant to the terms of the Contract.

Petitioner has consistently maintained that respondents defaulted on the contract and never tendered the funds to close. Petitioner is the only party who at any time came up with all the money necessary to close. Respondents always felled short of being able to close.

In Florida, the law is clear that in order to succeed on a Motion for Summary Judgement, a party must show that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. . . ." Florida Rules of Civil Procedure Rule 1-510(c).

The law is equally clear that summary judgement should not be granted where there are issues of fact raised by affirmative defenses which have not been effectively, factually challenged and refuted. *Luna v. Total Mortgage, Ltd.*, 533 So.2d 900; *Cufferi v. Royal Palm Development Co.*, 516 So.2d 983; *Aroll v. ITT Commercial Finance Corp.*, 496 So.2d 1011.

In the instant case, there are numerous questions of material fact in so far as respondents allegations are concerned and summary judgement should not have been granted, on a motion for Summary Judgement by respondents by a judge who later recused himself. On the contrary judgement, should have been granted in favor of petitioner in that the latter's positions are thoroughly documented in the written and executed agreement of the parties and in the written notices to respondents which notices are factually and legally indisputable and warrant Summary Judgement in favor of petitioner.

Respondents have repeatedly stated that they "paid" petitioner the sum of $172,964.84. It is indisputably evident that the amount in question, was in fact a loan provided by respondents to petitioner not only for the purpose of petitioner's closing on the property on or about August 28, 1990 under the first agreement but also to help serve the respondents' interest in preventing a forfeiture for their deposit and the cost and concern of exposure to liabilities on claims and possible litigation for default on the contract. To prevent these potential damages respondents urged the petitioner to close with his mortgage proceeds committed to petitioner only. Respondents agreed to loan petitioner some funds to close at the time of closing. Respondents did not have the total of and sufficient funds to close at that time or since. That this was a loan transaction is buttressed by the fact that the said promissory notes given by petitioner to respondents are evidence of a loan transaction and nothing more. The documentation speak for themselves. The lower court cannot rewrite the documentation or create a new and different set of facts. *International Expositions, Inc., v. City of Miami Beach,* 274 So.2d 29. Courts may not rewrite, alter or add to terms of a written agreement between the parties and may not substitute

their judgement for that of the parties in order to relieve one from alleged hardship or of an improvident bargain.

Furthermore, since said notes were still in respondents' possession, more than one year after they should have been returned by respondents' directly to petitioner, respondents have failed to satisfy the condition precedent of the October 30, 1990 Contract and Agreement, executed together, which called for the delivery of said notes as and for the consideration for the Sales Contract on or before November 2, 1990. This was indisputably a major default of the contract on the part of respondents as the return of the said notes marked canceled and paid in full were not only an essential consideration i.e. for the contract, but also conditions precedent to the contract and vital to the very existence or the survival of the agreement, which provided that " Time is of the essence of the Agreement," *Garcia v. Alfonso,* 490 So.2d 130, 131; *Delta Mobile Homes Inc. v. Ehmamn,* 375 So.2d 269.

Since respondents have failed to refute petitioner's Affirmative Defense of failure to satisfy conditions precedent, Summary Judgement granted to respondents must be reversed and judgement must be granted for the petitioner whose defenses and counter-claims are documented and therefore indisputable.

For reasons unknown to petitioner, the facts, issues and written agreements have been closeted into secrecy, ignored or have been mandated into silence or have been avoided by the lower courts in so far as an opportunity for petitioner to present them and have discourse with the court and obtain from the court specific findings of fact. Petitioner had attempted to request of the lower court, in support of petitioner's argument for entitlement for

summary judgement against respondents for an opportunity to address the court. On the one and only occasion petitioner had to allude to and present proof of these facts petitioner was silenced by the Court with the threat that if petitioner would try to talk to make his presentation and argument, the Judge would "call liaison and have you thrown out." Upon motion for disqualification made by the petitioner the said sitting judge of the Circuit Court of the 11th Judicial District in and for Dade County Florida recused himself from further consideration of the case and ordered that this cause shall be reassigned to another section of the Circuit Court in the 11th Judicial Circuit in for Dade County, Florida in accordance with established procedure.

The parties have the right to make time of the essence of the contract, and if it clearly and unequivocally appears from the contract by means of some expressed stipulation that time shall be essential, this expressed intention of the parties will be recognized both in law and equity. *Chabot v. Winter Co.,* 34 Fla 258 15 So. 756; *Tate v. Pensacola, Gulf, Land & Develop. Co.,* 37 Fla 439, 20 So 542 (1896); *Realty Secur. Corp. v. Johnson,* 93 Fla 46, 111 So 532 (1927); *Mahood v. Bessemer Properties, Inc.,* 154 Fla 710, 18 So 2d 775(1944); *Rybovich Boat Works Inc., v. Atkins,* 587 So.2d 519, 1991. Where time is of the essence in contract involving sale of real estate, no notice of default is required, under the unambiguous terms of "time is of the essence" clause. Said Court also comments and cites Florida 3rd DCA cases as follows; A time of essence clause is "not a stock phrase but was intended to give the sellers an immediate right to cancel the contract if the buyer were unable to timely demonstrate an ability to purchase." *Garcia v. Alfonso,* 490 So.2d 130. 131 (1986). Where time is of the essence no notice of default is required; *Delta Mobile Homes, Inc. v. Ehmann,* 275 So.2d 269 (1973).

The central issues are:

1. Is not the lower court required to acknowledge and give effect to an arms- length Contract negotiated over an extended period of time and executed by experienced and knowledgeable business individuals which contract contains clauses that time is of the essence as they relate to times of payment and time for closing? The answer is yes.

2. Have respondents made payments timely and have respondents closed timely? The answers are no.

3. Have respondents performed on conditions precedent and deliver timely the consideration for the contract i.e. the promissory notes, as required in the agreement? The answers are no.

The practical result of a want of consideration and failure of consideration are the same. In the first case the agreement is void; in the second the agreement is valid at the time of making, but cannot be enforced because of subsequent failure of the consideration on which it was based. *Jones v McCallum* (1885) 21 Fla 392; *Marks v Fields* (1948) 160 Fla 789, 36 So.2d 612.

Thus, either want or failure of consideration will ordinarily defeat recovery on contract. *Florida Enterprises, Inc.* (1963) 156 So.2d 703. The failure of consideration is the neglect, refusal, or failure of one of the parties to perform or furnish the consideration agreed upon. *Wallace v Ralph Pillow Motors,* (1977) 344 So.2d 949; *Holm v Woodworth,* 271 So.2d 167 (1972). Want or failure of

consideration is a defense under the Uniform Commercial Code. Section 673.408, Florida Statutes (1975).

In the case at bar the respondents' failed and refused to furnish to the petitioner the Consideration agreed upon namely the notes marked canceled and paid in full with delivery on or before November 2, 1990 which time was made of the essence by the contract. Therefore the foregoing defaults constituted a dual breach, one for failure of consideration and two for failure to deliver timely. The Contract for Sale and Purchase was a cash contract not subject to financing.

For the Court to ignore either one of the foregoing principals of law i.e. "consideration" or "time is of the essence" is reversible error; to neglect both is untenable and is tantamount to a flagrant rewriting of the terms of an executed Contract by parties who are long experienced in drafting, reading and executing complex Contracts and documentation involving real estate and related business enterprises. Respondents and members of their families have business and real estate ownership in several States of the United States and throughout the period of negotiations and the execution of the contracts among the parties hereto, were always represented by attorneys and\or accountants with offices in the States of Ohio, Georgia, New Mexico, and Florida.

Nor should a bond have been required of Petitioner by the court for a stay, as respondents not only had the defendant's Real Estate tied up with a lis pendens, but respondents also continue to be in possession and control of the real estate while petitioner is exposed to a liability on a mortgage upon which remains owing about $370,000.00, which mortgage respondents caused to go into default on an occasion but was corrected by petitioner

by a payment on the mortgage, which mortgage is guaranteed by petitioner individually. Petitioner had to make a $3000.00 plus monthly payment which respondents have failed to pay timely. This payment by petitioner has not been repaid by respondents and the court has already dismissed the said counterclaim of petitioner therefore, which was pleaded for by petitioner as one of the nine counterclaims interposed in this litigation, wherein each and all of the counterclaims interposed were dismissed summarily by the recused judge.

IMPAIRMENT AND OBLIGATION OF CONTRACT

The language of the consideration sentence is clear, i.e. the return of the promissory notes marked canceled and paid in full on/or before November 2, 1990, and when the language of the "Time of the Essence" sentence is clear, time of the essence means just that. Because the contract was clear it was not appropriate for the court to entertain any other time considerations as relates to time of payment or time to close other than those as are specifically provided for in the written agreements of the parties. It is not appropriate for the court to entertain other time factors and create new ones. The failure of the lower Court to observe and abide by the explicit and agreed terms of the executed agreement between experienced parties constituted a rewriting of the contract.

For the Court to ignore the expressed and lucid terms of an agreement by and between competent and experienced parties is not only unacceptable as a matter of good conscience but clearly is, also, a violation of the U.S. Constitution which prohibits the impairment of the obligation of Contracts. The Courts have consistently held that this, the legislatures cannot do. Likewise the

prohibition of the impairment of the obligation of the Contracts by the courts is applicable and enforceable when the Courts by their rulings have in effect changed the terms and thereby impaired the obligation of the contracts.

In *James J. Sepielli et al. v. Wilson P. Abraham Construction Corp. and Barnett Bank of Homestead,* 313 So.2d 122, the court by its order temporarily enjoining any foreclosure proceedings or any other actions on note and mortgage constituted an impairment by judicial action of the obligations of contract and was improperly issued in suit seeking money damages for the alleged fraudulent concealment.

In *Morton v. Zuckerman-Vernon Corp.,* 290 So.2d. 141 (Fla.App.), the Court said that the clause in the federal constitution prohibiting the impairment of the obligation of contracts applies to judicial decisions of the courts as there is no lawful basis to impair and abrogate the obligation of contracts by judicial action. The challenged order, which relieved the plaintiff of its obligation to pay interest as provided for under the note and mortgage and enjoined the holders thereof from enforcing their rights, was an impairment of the obligations of the contract, and a taking of property of the defendants without due process of law in violation of state and federal constitutional prohibitions. For the reasons stated, the order appealed was reversed, and the cause was remanded to the circuit court with directions to dismiss the complaint.

The language of the times of performance for the delivery of the consideration i.e. the return of the promissory notes marked canceled and paid in full on or before November 2, 1990 and the time for closing on or before December 31, 1990 are clear and the same were

never waived by the petitioner. Each and every document, discussion or other communication after the execution of the promissory notes and the Contract for Sale and Purchase were conditioned with the admonition that it was without prejudice to the terms of the written agreement by and between the parties. Respondents have not presented any correspondence or documentary evidence to the contrary. Any meetings subsequent to December 31, 1990 between the parties was not to attend a closing, but was for settlement discussion purposes and fact finding only, all without prejudice.

The courts do not exist to rewrite contracts for experienced business people, fully advised by competent counsel, in transactions devoid of any taint of bad faith or unfair dealing. *Home Development Co. of St. Petersburg v. Bursani,* 178 So.2d 113 (1965); *National Health Laboratories v. Bailmar, Inc.,* 444 So.2d 1078, 1080 (1984). The decisions of the lower courts constituted an impairment of the obligation of Contracts and thus, violated the Constitution of the United States. The reversal of the decision of the lower courts is mandated. Accordingly, we ask that this court gives effect to the arms-length contract of the parties arrived at as a result of free bargaining between them and reverse the lower courts' rulings in these matters.

The contract clause of the United Sates Constitution Article I, Section 10, Clause 1 states:

No State shall . . . pass any Bill of attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . .

So strictly is the rule against impairing the obligation of contracts to be enforced that the federal courts have uniformly held that the validity and obligation of a

contract made under an exposition of the law given by the highest tribunal of the state, as judicially declared at the time the contract was made, cannot be subsequently impaired by a later judicial decision altering the settled construction of the state law under which the contract was finally consummated as an agreement. *Douglas v. Pike County,* 101 U.S. 677, 25 L. Ed. 968.

TIME OF ESSENCE

1. Effect should be given to every word, phrase, clause, and sentence of a contract when construing it. *F. W. Woolworth Co. v. Peterson,* 78 F.2nd 47 1935.

2. Where time is of the essence of a contract, there can be no recovery at law in case of failure to perform within time stipulated. *Jones v. U.S.,* 96 U.S. 24, 24 L.Ed. 644, affirming 11 Ct.Cl. 733.

3. The time fixed for performance is at law deemed the essence of a contract. *Bank of Columbia v. Hagner,* 26 U.S. 465.

4. Court cannot speculate, nor permit jury to speculate, as to reasonableness or importance of provision of commercial contracts. *Burrows & Kenyon v. Warren,* 9 F.2d 1.

5. Business contracts must be construed with business sense, as they would be understood by intelligent men of affairs. *In re International Match Corporation,* 20 F.Supp. 420.

6. Where there is no doubt as to the meaning of the contract, there is no room for construction. *E.H. Stanton Co. v. Rochester German Underwriters' Agency,* 206 F. 978.

7. Where the intention of the parties to limit a contract to a certain period is manifest, time is of the essence of the contract. *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 113 F. 256, 51 C.C.A. 213.

DUE PROCESS

In a memorandum of law in support of respondent's Motion for Summary Judgement dated August 13, 1991 counsel for respondents on page two thereof represented to the petitioner and to the lower court that "The original deposition of Frank Bona, Sr. taken June 12, 1991 is being filed simultaneously herewith." The fact is that said deposition was not filed at that time as there are no known filings of record thereof in the office of the Clerk of Dade County or for the Clerk, Circuit County Courts, Dade County Courts, Florida. Petitioner learned on or about one week prior to June 23, 1992 that the same had not been filed and thereupon petitioner caused the said deposition of Petitioner to be filed in the office of the Circuit Court Dade County, Fla. on said June 23, 1992. The foregoing clearly shows that during the days proceeding, on, and following respondents' motion for summary judgement there were no depositions or other testimony before the court for the petitioner when the court executed an Order on Motion for Summary Judgement and Final Summary Judgement for Specific Performance dated April 13th 1992 in favor of respondents. The foregoing clearly establishes the fact that the judgement adverse to Petitioner was granted more than two months prior to the filing of Petitioner's deposition, while on the other hand respondents' depositions had been on file in the office of Circuit Court Dade County, Fla. and were before the court since November 26, 1991 or for more than four months prior to judgement on April 13, 1992. The sworn testimony of the petitioner was never before the court prior to, or at

the time judgement adverse to petitioner was granted by the same judge who later recused himself.

For the purpose of clarity as to the chronology of events we set forth below the following:

PAPERS FILED	DATE OF FILING
Counsel for respondents represented that he filed Deposition of Appellant on 8/13/91, but did not	No filing
Manual Chavez. Sr, deposition	11/26/91
Deposition of Geraldine Vigil Chavez, deposition	11/26/91
Judgement of Circuit Court	04/13/92
Petitioner for the first time by anyone caused his deposition to be filed on	06/23/92

To frustrate further the interests and the cause for justice, the petitioner, who had discharged his counsel and had requested respectfully of the Court for an opportunity to present his case, the court prohibited the petitioner to speak and was rudely and sternly admonished by the sitting judge who later recused himself, that if he would make any comment said judge, would "call liaison and have you thrown out."

Following said incident upon motion by petitioner said judge did recuse himself from the case but nonetheless refused petitioner's Motion to vacate the judgement he rendered against the petitioner all without opportunity of

presentation, rebuttal or petitioner's 110-page deposition on file or before the Court prior to and/or at the time judgment was rendered by said recused judge.

On the contrary the approximately 110-page deposition of Manuel Chavez, Sr. and the approximately 60-page deposition of Geraldine Vigil Chavez, the respondents, had been on file with the Clerk of the Court for more than four months prior to the date of the Order of Final Summary Judgment rendered by the lower court on April 13, 1992.

The foregoing clearly is not fair, impartial, reasonable treatment or conduct on the part of a judge in the premises as is required by the Due Process clauses of the United States Constitution.

1. The demands of due process required by the Fourteenth Amendment are such as accord with Traditional concepts of fair play, substantial justice, and a resolution of controversy upon the merits. U.S. Const. Amend 14. *Murphy v. Helena Rubinstein Co.,* 234 F.Supp.893.

No hard and fast rule can be laid down as to what is or what is not due process but is picked out of the facts and circumstances of each case. U.S. Const. Amend 14. Application of *Holley,* 205 F. Supp. 933.

2. Due process requires that we be ruled by law and not by fiat. U.S. Const. Amend 14. *Baker-Chaput v. Cammett,* 406 F.Supp 1134.

3. Purpose of due process is the protection of the individual from arbitrary action. *Daigle v. Helgemoe,* 339 F.Supp. 416.

4. "Due process" is equaled with terms of "fair treatment" and "reasonable action" in the premises. *Olson v. Regents of University of Minn.*, 301 F.Supp. 1356.

5. The required form that procedural due process is to take in any given case must be accommodated to the facts of each case. U.S. Const. Amend. 14. *Birdwell v. Hazewood Scholl Dist.*, 352 F. Supp. 613.

6. Fundamental requisite of due process of law is opportunity to be heard and hearing must be at meaningful time and in meaningful manner. *Desmond v. Hachey,* 315 F. Supp. 328.

REASONS FOR GRANTING THE WRIT

A. This case presents important questions of when and to what extent if any is it permissible under the Prohibition of the Obligations of the Contract Clause for a court to ignore or redefine the clear and historically defined expression "Time is of essence" clause of a Contract and thereby not be in violation of the Prohibition of impairing the obligation of contracts provisions as set forth in United States Constitution Article I Section 10 Clause 1

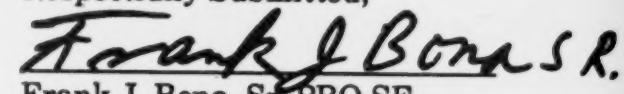
B. A Writ of Certiorari should be granted in that on the first occasion when petitioner appeared before the judge of the lower court, without counsel, petitioner's counsel having been discharged, the court was informed that petitioner was representing himself, whereupon petitioner by order of the said judge, who was later recused, was prohibited to speak in violation of the due process clause of the 14th Amendment of the United States Constitution.

C. A Writ of Certiorari should be granted to correct the violation of the petitioner's opportunity and right to present his case which was destroyed when in support of a Motion for Summary Judgement the attorney for respondents had represented to the petitioner and to the court that the deposition of appellant was being filed simultaneously therewith, i.e. on August 13, 1991, but in fact was not filed and as a result the case for the appellant, contrary to that of the respondents, was never before the court prior to, during, or until a few months after the judgement in favor of the respondents had been entered by the lower court judge, who upon Motion of petitioner had recused himself but did not vacate said adverse rulings, all in violation of the fundamental rules of fairness and justice and thus in violation of the due process clause of the 14th Amendment of the United States Constitution.

CONCLUSION

For these reasons, a writ of Certiorari should issue to review the judgement of the Supreme Court of Florida.

Respectfully Submitted,



Frank J. Bona, Sr. PRO SE
Attorney and Counselor at Law
of the State of New York
3975 N.W. South River Drive
Miami, Florida 33142
(305) 635-0020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to Houston & Shahady, P.A., Attorneys for Respondents, 100 N.E. 3rd, Suite 850, Fort Lauderdale, FL 33301-1146, this 10 th day of May, 1993.

Frank Bona, Sr. PRO SE
3975 N.W. South River Drive
Miami, Florida 33142
(305) 635-0020

By Frank Bona SR.
Frank Bona, Sr. PRO SE
Petitioner

APPENDIX

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APPENDIX

SUPREME COURT OF FLORIDA

MONDAY, FEBRUARY 15, 1993

CASE NO. 81,235

District Court of Appeal,
3rd District — No. 92–1097

FRANK BONA, SR.,

Petitioner,

vs.

MANUEL CHAVEZ, SR., ET AL.,

Respondents.

It appearing to the Court that it is without jurisdiction, the Petition for Review is hearby dismissed.

No motion for rehearing will be entertained by the Court.

A true copy
TEST:

Sid J. White

Sid J. White
Clerk Supreme

H

cc: Hon. Louis J. Spallone, Clerk
Hon. Harvey Ruvin, Clerk
Hon. Juan Ramirez, Jr. Esquire
Mr. Frank Bona, Sr.
Thomas R. Shahady, Esquire

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1993

JANUARY 19 , 1993

CASE NO. 92-1097

FRANK BONA, JR.,

Appellant,

vs.

MANUEL CHAVEZ, SR., et al.,

Appellee.

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy

24

ATTEST

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District 24

By Nillie M. B.
Deputy Clerk

cc: Frank Bona, Sr. Thomas R. Shahady
/nbc

24

[NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.]

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

CASE NO. 92-1097

FRANK BONA, SR.,

Appellant,

vs.

MANUEL CHAVEZ, SR., et al.,

Appellees.

Opinion filed November 24 , 1992.

An Appeal from the Circuit Court for Dade County, Juan Ramirez, Jr., Judge.

Frank Bona, Sr., in proper person.

Houston & Shahady and Eric S. Glatter and Tom Shahady, for appellees.

Before SCHWARTZ, C.J., and COPE and GERSTEN, JJ.

PER CURIAM.

Affirmed.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

JULY 30 , 1992

CASE NO. 92-1097

LOWER TRIBUNAL NO. 91-14255

FRANK BONA, SR.,

Appellant(s),

vs.

MANUEL CHAVEZ, SR., et al.,

Appellee(s).

Upon consideration, appellant's emergency motion for stay of execution of judgement is denied. NESBITT, COPE and GODERICH, JJ., concur.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By: James Manees
Deputy Clerk

cc: Frank Bona, Sr.
/JM

Thomas R. Shahady

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

DIVISION:

CASE NO. 91-14255 CA 1

ORDER OF RECUSAL

MANUEL CHAVEZ, SR., et al.,

Plaintiff(s),

vs.

FRANK BONA, SR.,

Defendant.

THIS CAUSE came on to be heard on the Defendant's Motion to Recuse and the Court being fully advised in the premises, it is

ORDERED AND ADJUDGED that the undersigned Circuit Court Judge hereby recuses himself from further consideration of this case.

IT IS FURTHER ORDERED AND ADJUDGED that this cause shall be reassigned to another section of this Court in accordance with established procedure.

DONE AND ORDERED at Miami, Dade County, Florida this 20 day of July 1992.

JUAN RAMIREZ, JR.

CIRCUIT JUDGE

Copies Furnished to : JUAN RAMIREZ, JR.

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

DIVISION:

CASE NO. 91-14255 CA 1

MANUEL CHAVEZ, SR., and
GERALDINE VIGIL CHAVEZ,

Plaintiff(s),

vs.

FRANK BONA, SR.,

Defendant.

ORDER GRANTING MOTION TO TAX COSTS AND ATTORNEYS' FEES

THIS CAUSE having come on to be heard on June 9, 1992 upon Plaintiffs' Motion to Tax Costs and Attorneys' Fees, and the Court having reviewed the applicable Motions and Affidavits, having heard the testimony of the Plaintiffs' attorney and its expert, and the Defendant, being represented pro se, having entered no objection to the taxing costs and/or attorneys' fees, it is thereupon:

ORDERED AND ADJUDGED as follows:

1. That the Plaintiffs do have and recover from the Defendant the sum of $9,893.50 as attorneys' fees now determined by the Court to be reasonable.

2. That the Plaintiffs do have and recover from the Defendant the sum of $525.00 for the services of John M.

Ross, Esq., who testified on behalf of the plaintiffs as the reasonable cost for expert witness fees at the rate of $175.00 per hour.

3. That the plaintiffs do have and recover from the Defendant costs in this matter of $1,291.25 representing Filing Fees, Recording fees, Service of process Fees, and Miscellaneous Court Reporting Expenses.

4. That the Plaintiffs do have and recover the total sum of $11,709.75 representing the total sums set forth in paragraphs 1, 2 and 3 above, for which let execution issue.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 12th day of June, 1992.

Juan Ramirez, Jr.

Circuit Court Judge

Copies furnished:

Thomas R. Shahady, Esq.
Frank Bona, Sr.

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

CASE NO. 91-14255 CA 23

MANUEL CHAVEZ, SR., and
GERALDINE VIGIL CHAVEZ,

Plaintiffs,

-vs-

FRANK BONA, SR.,

Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT AND FINAL SUMMARY JUDGMENT FOR SPECIFIC PERFORMANCE

THIS CAUSE having comes before the Court upon the Motion for Summary Judgment filed by the Plaintiff and the Motion for summary Judgment filed by the Defendant, and the Court having review the Affidavits of the parties, Memorandums of law submitted by counsel, depositions on file, and being otherwise fully advised in the premises, and having determined that no issue of law exists and that a summary judgment should be entered in favor of the Plaintiffs, MANUEL CHAVEZ, SR. and GERALDINE VIGIL CHAVEZ, and against the Defendant, FRANK BONA, SR. it is thereupon

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Summary Judgment is hereby denied.

2. That Case No. 91-3007 CC 24 which was con-

solidated with this matter by order of the County, Judge Raphael Steinhardt dated December 20, 1991, wherein FRANK BONA, SR. is the Plaintiff and MANUEL CHAVEZ, SR. and GERALDINE VIGIL CHAVEZ, are Defendants is hereby dismissed, and Plaintiff shall go hence without day.

3. The Defendant, FRANK BONA, SR. shall take nothing as a result of his Counterclaim herein.

4. Plaintiff's Motion for Summary Judgment for Specific Performance is hereby granted and Defendant, FRANK BONA, SR. is hereby ordered to execute a Warranty Deed within 30 days of the date of this Order and Final Judgment to Plaintiff's, MANUEL CHAVEZ, SR. and GERALDINE VIGIL CHAVEZ on the following described property:

> Lot 6, Block 5, ALTOS DEL MAR SUBDIVISION NO. 1, as recorded in Plat Book 31, Page 40, of the public records of Dade County, Florida.
>
> a/k/a 7801 Atlantic Way, Miami Beach, Florida or 75-78th Street, Miami Beach, Florida

5. The Promissory Notes dated August 29, 1990 in the amount of $155,100 and September 24, 1990 in the amount of $17,864.84 from FRANK BONA, SR. to MANUEL CHAVEZ, SR., proffered to the Defendants through the Court on November 15, 1991 shall be provided to the Defendant and/or his counsel at the time of the transfer of the property to Plaintiffs. Said Notes shall be cancelled and marked paid in full.

6. In the event Defendant fails or refuses to execute said Warranty Deed within 30 days of the date of the

Final Judgment, then the Court hereby appoints Arthur Leibell, Esq., as Special master in this matter for and on behalf of the Defendant, FRANK BONA, SR., to execute a Warranty Deed pursuant to the terms and conditions of the contract between the Plaintiffs, MANUEL CHAVEZ, SR. and GERALDINE VIGIL CHAVEZ, and Defendant, FRANK BONA, SR. dated October 30, 1990, attached to Plaintiff's Complaint as Exhibit "C".

7. Said Master shall have full power and authority to execute any and all documents necessary to effectuate said transfer by a general warranty deed. Any expenses of said Commissioner in performing his duties in this matter shall be taxed against Defendant as additional cost herein. Appointment of said Master shall be effective 30 days after the date of this Final Judgment upon notification by Plaintiff's counsel of Defendant's refusal to execute a Warranty Deed in favor of the Plaintiffs.

8. The Court retains jurisdiction of this matter for the purposes of taxing fees and costs, and granting such other further relief as the Court may deem necessary and just.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 13th day of April, 1992.

Juan Ramirez, Jr.
CIRCUIT JUDGE

Copies furnished to:

Thomas R. Shahady, Esquire
Michael Quarequio, Esquire

Supreme Court, U.S.
FILED
JUN 10 1993
OFFICE OF THE CLERK

No. 92-1827

In The

Supreme Court of the United States

October Term, 1992

FRANK BONA, SR.,

Petitioner,

vs.

MANUEL CHAVEZ, SR. and GERALDINE VIGIL CHAVEZ,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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I. The Supreme Court has no jurisdiction therefore, these proceedings are an attempt by the Petitioner to appeal an adverse determination of the state court which does not involve a federal question of law. 5

II. The state court's interpretation of the contract and its granting of Summary Judgment in favor of the Respondents does not create an impairment of contract in violation with Article I, Section 10, Clause 1 of the United States Constitution as the Petitioner would like this Court to believe. 11

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No. 92-1827

In The

Supreme Court of the United States

October Term, 1992

FRANK BONA, SR.,

Petitioner,

vs.

MANUEL CHAVEZ, SR. and GERALDINE VIGIL CHAVEZ,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Florida

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 24.2, the Respondents are dissatisfied with the Petitioner's presentation of the Statement of the Case and, thus, will set forth their objections and correct any inaccuracies or omissions in the Petitioner's Statement of the Case.

The Respondents object to the Petitioner's statement that the Assignment of Contract (hereinafter "Assignment") was terminated by the parties. Petitioner, as President of New K Investments of Florida, Inc., entered into a written contract with a third party for the sale and purchase of certain real property that was located in Broward County, Florida. The contract set forth a purchase price of $501,000 and further required a $50,100 deposit. The Petitioner, on behalf of New K Investments of Florida, Inc., entered into the Assignment with the Respondents. As consideration for the Assignment, the Respondents paid to the Petitioner $55,100, which represented a $50,100 deposit and a $5,000 reimbursement for an extension fee paid by the Petitioner. The record clearly reflects that the Assignment was not terminated by the parties.

It was undisputed that the Petitioner would take title to the property in his personal capacity with a view to later transfer the property to the Respondents. At the time of the closing with the third parties, which occurred on August 27, 1990, Respondents paid to the Petitioner, or on Petitioner's behalf, $172,964.84, which amount included a $25,000 profit to the Petitioner for entering into the Assignment. The remainder of the purchase price was paid by the Petitioner through his obtaining a mortgage in the amount of $375,000. It was agreed between the parties that the Respondents would either assume the Petitioner's mortgage or obtain new financing if the assumption was not approved.

On October 30, 1990, the Petitioner requested that a Contract for Sale and Purchase be entered into between the parties (hereinafter "Contract"). The reason for the execution of the Contract was because Southeast Bank would not release an assumption package to the Respondents until the contract had been executed between the parties.

The Respondents object to the Petitioner's statement that the

delivery of the two promissory notes marked "paid in full" was a condition precedent to the closing of the Contract. The intention of the parties was for the return of the promissory notes concurrent with the delivery of the deed which was agreed to by the parties two months prior to the Agreement created by the Petitioner. The promissory notes were represented on the Contract as a deposit against the sale price, such that, upon closing, the balance due from the Respondent would be $375,750.

Respondent additionally objects to the Petitioner's statement that the Contract made time of the essence. The Contract states:

> This transaction shall be closed and the deed and other closing papers delivered on December 31, 1990, unless extended by other provisions of the contract.

After the contract was entered into, the parties entered into a subsequent agreement (hereinafter "Agreement"), which was prepared by the Petitioner. The Agreement places additional burdens upon the Respondents including the delivery of the promissory notes to the Petitioner marked "payment in full", and requires the Respondent to pursue with diligence the assumption of the mortgage in order to assure a closing date of December 31, 1990, wherein, time is of the essence. The Agreement was unenforceable for many reasons, but primarily because there was no consideration given to the Respondents. The Respondents have tendered the promissory notes to the state court.

It is undisputed that the Respondents took possession of the property immediately after title had been transferred to the Petitioner. The Respondents have paid each of the mortgage installments to Sears Mortgage and Southeast Mortgage since taking possession of the property. The Petitioner did make one mortgage payment, for which he was reimbursed by the

Respondents, due to the fact that the mortgage had been sold by Southeast Mortgage to Sears Mortgage Corporation and the Petitioner failed to notify Respondents of the transfer.

It is undisputed that a closing date was scheduled between the parties for December 31, 1990 at Columbia Title. On December 31, 1990, Columbia Title notified the Petitioner that they were awaiting approval of the Respondents' assumption of the Petitioner's mortgage with Sears Mortgage Corporation; and that the Petitioner should contact Columbia Title in order to reschedule the closing for the first week of January, 1991.

It has been the Respondents' position that even if there was a valid and enforceable "time is of the essence" clause, the Petitioner expressly and impliedly waived the clause, which is supported by the record. The record reveals that a closing date was agreed to by the parties and scheduled for January 4, 1991 at Columbia Title. Both the Respondents and the Petitioner were present at the January 4, 1991 closing. Prior to the closing actually taking place, Columbia Title received bank verification that the Respondents had been approved for the loan assumption. However written verification would not be forthcoming until a few days later. Columbia Title advised both parties that upon verbal approval by Sears Mortgage Corporation, the closing could take place, however, the Petitioner refused to close the transaction. The Petitioner contended that he did not close the transaction because the Respondents have been "ungentlemanly towards me". Thereafter, Columbia Title received written verification that the loan assumption had been approved, and notified both parties. The Petitioner has continually refused to close this transaction and has brought this suit for specific performance.

The state court interpreted the Contract and the subsequent agreements made thereto, and enforced it pursuant to its terms and the intentions of the parties. The state court's ruling in no shape or

form constituted an impairment of the obligations of contracts in violation of Article I Section 10 paragraph 1 of the Constitution of the United States.

The Petitioner is incorrect when he states that the Supreme Court of Florida affirmed the decision of the lower courts. The Supreme Court of Florida dismissed the appeal because it was without jurisdiction.

REASON FOR GRANTING THE WRIT

I.

THE SUPREME COURT HAS NO JURISDICTION, THEREFORE, THESE PROCEEDINGS ARE AN ATTEMPT BY THE PETITIONER TO APPEAL AN ADVERSE DETERMINATION OF THE STATE COURT WHICH DOES NOT INVOLVE A FEDERAL QUESTION OF LAW.

The Petitioner has sought review pursuant to 28 U.S.C. § 1255, and contends that the state court has decided a federal question in a way that conflicts with applicable decisions of this Court and the Constitution of the United States. 28 U.S.C. § 1257 confers discretionary jurisdiction on this Court to review decisions of the state courts. 28 U.S.C. § 1257 states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or

> immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The federal district court has no jurisdiction over proceedings which are essentially an effort to appeal adverse determinations of the state court where the suit does not challenge the constitutionality of state laws, but only requests personal relief solely to vindicate individual claims. *Dasher v. Supreme Court of Texas*, 650 F.2d 711 (Fed. Cir. 1981). The issues raised by the Petitioner in his Petition are wholly a matter of conjecture which are being raised for the first time. The Petitioner is attempting to challenge the state court judgment on two additional grounds. The Petitioner argues that the state court decision constitutes a denial of his due process rights pursuant to the Fourteenth Amendment and an impairment of his right to contract in violation of the United States Constitution, Article I, § 10, Clause 1. Neither of these claims are properly before this Court because they were not raised or addressed in the state court. The Petitioner has failed to provide a record which establishes that the federal questions were raised in the state court. It is essential that a federal question be brought to the attention of the state court. *Greenbay & Mississippi Canal Company v. Patton Paper Co.*, 172 U.S. 58, 43 L. Ed. 658 (1989); *Yee v. City of Escondido, Cal.*, 112 S. Ct. 1522 (1992). In *Yee*, the Yees did not include a due process claim in their complaint, nor did they raise it in the appellate court. It was not until they petitioned to the California Supreme Court that the Petitioners finally raised a substantive due process claim. The state supreme court denied discretionary review and expressed no views as to the merits. In essence, the Petitioners failed to raise a substantive due process claim in the state courts, and no state court has addressed such a claim.

The Court in *Yee*, stated:

> In reviewing judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with rare exceptions, refused to consider petitioners' claims that were not addressed below. *Illinois v. Gates*, 462 U.S. 213, 218-220, 103 S. Ct. 2317, 2321-2323, 76 L. Ed. 527 (1983) . . . Because Petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here.

Yee at 1531.

If nothing in the record indicates that a federal question was presented to the state court, the Supreme Court will not take judicial notice that a federal question might have been involved in the case. *Yazoo & M.R. Co. v. Adams,* 180 U.S. 41, 45 L. Ed. 415 (1901).

In connection with a certiorari petition seeking the United States Supreme Court's review of a state court decision, there should be no doubt from the record that a claim under a federal statute, or the United States Constitution, was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. *Webb v. Webb,* 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981). If the constitutional right was not set up or claimed in the proper court below, the judgment of the highest state court is conclusive, so far as the right of review to this Court is concerned. *Miller v. Texas,* 153 U.S. 535, 38 L. Ed. 812, 14 S. Ct. 874 (1894).

The Supreme Court's jurisdiction to review a state court decision, whether by appeal or by certiorari, is dependent upon the

presence of a federal question in the case. *St. Louis, I.M. & S.R. Co. v. Taylor,* 210 U.S. 281 (1908). The Supreme Court is not a court of general jurisdiction which can correct any error in state court proceedings; its powers are limited to correcting denials of federal rights in specific instances. *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86, 53 L. Ed. 417 (1909).

In the case at bar, it is clear from the record that the claims now being raised by the Petitioner were not made to the state court pursuant to a federal statute or the United States Constitution. Nowhere does the record disclose that the state court was apprised of the nature or substance of the federal claims made by the Petitioner. In order for a state court case to be reviewed by the Supreme Court, it must appear from the record that a federal question was decided by the state courts, or that the judgment rendered could not have been given without the citing of a federal question. *First National Bank v. Estherville,* 215 U.S. 341, 54 L. Ed. 223 (1910); *Harding v. Illinois,* 196 U.S. 78, L. Ed 394 (1904). It is not sufficient that the federal question was raised or might have been decided by a state court; the record might show expressly, or by necessary implication, that a federal question was actually decided by the state courts adversely to the Petitioner. *Kansas Endowment Association v. Kansas,* 120 U.S. 103, 30 L. Ed. 593; *Sayward v. Denny,* 158 U.S. 180, 39 L. Ed. 941 (1895).

The Supreme Court has held that there may be grounds for dismissing an appeal to the United States Supreme Court from a state court where it does not appear that a state court expressly passed upon a federal question. *Bells G.R. Co. v. Pennsylvania,* 134 U.S. 232, 33 L. Ed. 892 (1890).

Several presumptions are used to determine if the state's highest court did actually determine a federal question. *Chambers v. Mississippi,* 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973). If the highest state court has failed to expressly pass on a

federal question, it is assumed that the omission was due to a failure to properly present the federal question to the state courts unless the Appellant or Petitioner in the United States Supreme Court can firmly show to the contrary. *Street v. New York*, 394 U.S. 576, 22 L. Ed. 572, 89 S. Ct. 1354 (1969). It therefore assumed that the omission was due to a failure of the Petitioner to properly present any federal question. Another presumption is utilized by the Supreme Court if there is no opinion written by a state supreme court. If no opinion was written and it appears that the judgment might have rested upon a non-federal ground, the United States Supreme Court will not take jurisdiction. *Durley v. Mayo*, 351 U.S. 277, 100 L. Ed. 1178, 76 S. Ct. 806 (1956); *Stembridge v. Georgia*, 343 U.S. 541, 96 L. Ed. 1130, 72 S. Ct. 832 (1952). In the case at bar, not only did the state supreme court not render an opinion, but they dismissed the appeal for lack of jurisdiction. The Supreme Court of Florida stated:

> It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed.
>
> No motion for rehearing will be entertained by the Court.

The Florida Rules of Appellate Procedure 9.030(a)(2)(A) gives the state supreme court discretionary jurisdiction to review:

> (A) decisions of the district courts of appeal that:
>
> (i) expressly declare valid a state statute;
>
> (ii) expressly construe a provision of the state or federal constitution;

> (iii) expressly affect a class of constitutional or state officers;
>
> (iv) expressly and directly conflict with a decision of another district court of appeal or the Supreme Court on the same question of law;
>
> (v) pass upon a question certified to be of great public importance;
>
> (vi) are certified to be in direct conflict with decisions of other district courts of appeal.

If the state supreme court lacked discretionary jurisdiction to review the Petitioner's claim, then this Court certainly does not have jurisdiction.

The United States Supreme Court has no authority to review state determinations of purely state law, nor does it review federal issues that can have no affect on the state court's judgment. *Longshoreman's Association v. Davis*, 90 L. Ed. 2d 389, 106 S. Ct. 1904 (1986). It is well accepted that the United States Supreme Court will not review a decision of a state court resting upon adequate and independent non-federal grounds. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991); *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S. Ct. 183 (1935). The decision rendered by the state court was determined on state grounds and there is no reference in the record to a federal question.

II.

THE STATE COURT'S INTERPRETATION OF THE CONTRACT AND ITS GRANTING OF SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS DOES NOT CREATE AN IMPAIRMENT OF CONTRACT IN VIOLATION WITH ARTICLE I, SECTION 10, CLAUSE 1 OF THE UNITED STATES CONSTITUTION AS THE PETITIONER WOULD LIKE THIS COURT TO BELIEVE.

Article I, Section 10 of the Constitution provides:

> No state shall . . . pass any . . . law impairing the obligation of contracts.

Impairment of a contract by judicial decision does not raise a federal question which can be reviewed by this Court. *Kryger v. Wilson*, 242 U.S. 171, 61 L. Ed. 229, 37 S. Ct. 34 (1916). This Court cannot review judgments of state courts on the grounds that they refuse to give effect to valid contracts or impaired obligations of contracts, where the obligations are not impaired by the law of the state. *St. Paul, M. & M.R. Co. v. Todd County,* 142 U.S. 282, 35 L. Ed. 1014, 12 S. Ct. 281 (1892). Based on this reasoning alone, the Court should deny Petitioner's request for certiorari.

Petitioner claims that the state court's Order on Motion for Final Summary Judgment for Specific Performance (attached to the Petitioner's brief as App. 11) substantially impaired the obligations of the agreements between the parties. The Petitioner's brief is nothing more than a futile attempt to create a federal question to invoke this Court's jurisdiction. The state court decided from the pleadings, depositions, answers of interrogatories and admissions on file, together with affidavits, that there was no genuine issue as to any material fact. The state court interpreted the

contract together with all subsequent modifications made thereto, and decided on independent state grounds that the Respondents were entitled to specific performance.

The Court in *General Motors Corp. v. Romain*, 112 S. Ct. 1105 (1992) stated:

> Generally, we first ask whether the change in state law has "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722, 57 L. Ed 569 (1983); *Energy Reserves Group, Inc., v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L. Ed. 569 (1983).
>
> This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial.

In the present action there has been no amendments or modifications to the state law which would change the legal enforceability of the agreements entered into between the parties.

> The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws and existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the order . . . If any subsequent law effect to diminish the duty, or to impair the right, it

> necessarily bears on the obligation of the contract. *McCracken v. Hayward,* 2 HOW. 608, 612, 11 L. Ed. 397 (1844). *See also, Von Hoffman v. City of Quincy,* supra.

General Motors Corp. v. Romain, 112 S. Ct. 1105 (1992). In the present action the obligation of the agreement was binding on the parties and there was no subsequent law to diminish the duty, or to impair the right of the obligations of the contract. There were no changes in the remedies available under the contract, which may convert an agreement enforceable at law into a mere promise, thereby, impairing the contract's obligatory force. *General Motors Corp.* at 1111.

REQUEST FOR ATTORNEY'S FEES

The Respondents request attorney's fees and costs be awarded to them pursuant to the contract and the federal statutes/rules.

CONCLUSION

For these reasons, Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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No. 92-1827

in the

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM OF 1992

FRANK J. BONA, SR.

Petitioner,

vs.

MANUEL CHAVEZ, SR. and
GERALDINE VIGIL CHAVEZ,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

STATEMENT OF CASE

Petitioner adopts the provisions of *Supreme Court Rule 24.2* to set forth its objections to Respondents' Statement of the Case and to correct any inaccuracies contained therein.

Petitioner realleges and adopts by reference the facts of the case as fully set forth in its Statement of the Case contained in the Petition FOR A WRIT OF CERTIORARI.

Respondent objected to Petitioner's Statement that the Contract made Time of the Essence. The Contract speaks for itself and paragraph "I" specifically states Time is of the Essence. That language is clear and unambiguous with no interpretation or explanation necessary.

The two typed papers entitled "Agreement between Geraldine Vigil Chavez and Manuel Chavez and Frank J. Bona, Sr" and the printed Contract For Sale and Purchase which were executed by the said parties at the same sitting and time constituted one and the entire agreement of the parties. Paragraph #6 lines 5 and 6 of the former also provides that "Time is of the essence of this agreement and the contract for Sale and Purchase."

In order to ensure the correct presentation of each Lower Court's determination, Petitioner included in its Petition a concise list of the Opinions Below and a copy of each Order in the Appendix. Thus there should be no confusion regarding each ruling. Each Order speaks for itself without need of explanation by either Petitioner or Respondent.

ARGUMENT

I.

RESPONDENTS SHOULD NOT BE ALLOWED TO ARGUE PETITIONER IS NOT ENTITLED TO ASSERT A DUE PROCESS VIOLATION WHEN RESPONDENTS CAUSED THE VIOLATION.

Respondents argue that Petitioner has not preserved its right to allege a Due Process

violation. Respondents are aware, however, that in the Lower Courts petitioner has consistently argued that the failure of the Respondents to file the deposition of the Petitioner after informing the Court and Petitioner that it was doing so prevented Petitioner from receiving fair and equal consideration of its claims. Respondents initially were under no obligation to file the deposition. Once, however, they made the representation to the Court and Petitioner in their Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment that they were simultaneously with the filing of that document filing the Deposition, they assumed that responsibility. Since there was no trial, Respondents had full knowledge that only through the deposition would the testimony of Petitioner be available to the Court. Respondents willingly assumed a weighty responsibility when they made that representation to the Court. Respondents indeed filed their depositions neglecting only to file that of Petitioner. Petitioner will refrain from speculating why Respondents chose this course of action. The result, however, is without speculation.

The Trial Court had the depositions of the Respondents before it for four months prior to rendering its Summary Judgment. The misrepresentation of the Respondents denied Petitioner a fair hearing and was a flagrant violation of due process. Petitioner brought this abuse to the attention of the District Court of Appeal of Florida, Third District. Logically, Petitioner could only notify the Court of the violation after he became aware of it. Since Petitioner justifiably relied on the representations of Respondents made to the Trial Court regarding the filing of his deposition, he was unaware of the due process violation until after that Court had rendered its judgement. Respondents' argument that Petitioner failed to preserve its claim must fail if the term due process has any meaning. The demands of due

process required by the Fourteenth Amendment are such as accord with Traditional concepts of fair play substantial justice, and a resolution of controversy upon the merits. *Murphy v. Helena Rubinstein Co., 234 F.Supp. 893.*

Certainly there was no fair play, substantial justice or a resolution of the controversy upon the merits where counsel for the Respondents made the above cited representations which were not correct and true and in a situation where some new ground arose after judgment, during or after appeal or something was newly discovered that could have been presented during the trial, but was not, relief from judgment should be used to reverse judgment previously affirmed by the District Court of Appeal. *West's F.S.A. RCP Rule 1.540 -- Gregory v. Connor, 591 So.2d 974.*

REQUEST FOR ATTORNEY'S FEES

The Petitioner requests attorney's fees and costs be awarded him pursuant to the Contract and the Federal Statutes/rules.

CONCLUSION

For the reasons stated herein and in the Petition for a Writ of Certiorari, a Writ of Certiorari should issue to review the Judgment of the Supreme Court of Florida.

Respectfully Submitted,

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